

**POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

CITY OF UNION GAP and AHTANUM
RIDGE BUSINESS PARK, LLC,
Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB NO. 05-078

**ORDER GRANTING
SUMMARY JUDGMENT**

This matter comes before the Board on Respondent Department of Ecology's (Ecology) Motion for Summary Judgment and also Appellants' (Union Gap and ARBP) Motion for Summary Judgment. Board members William H. Lynch, Chair and William H. Lynch Bill Clarke, member deliberated on the motion. Administrative Appeals Judge Cassandra Noble presided for the Board. The Board has reviewed and considered the pleadings and other motion papers contained in the Board record, including the following:

1. Ecology's Motion and Memorandum in Support of Summary Judgment;
2. Declaration of Dan Haller, October 12, 2005;
3. Declaration of Stephen H. North, October 12, 2005 and Exhibits 1 through 44;
4. Joint Response of Ahtanum Ridge Business Park and Union Gap to Ecology's Motion for Summary Judgment;
5. Declaration of Jeff Slothower, October 26, 2005, and Exhibits A through G;
6. Declaration of Mayor Reeves Re Department of Ecology's Summary Judgment Briefing, October 25, 2005;
7. Ecology's Reply in Support of Motion for Summary Judgment;

ORDER GRANTING
SUMMARY JUDGMENT
PCHB NO. 05-078

8. Appellants Union Gap and Ahtanum Ridge Business Park's Joint Motion for Summary Judgment and Memorandum in Support;
9. Declaration of Jeff Slothower, October 12, 2005, and Exhibits A through G;
10. Declaration of Mayor Reeves Re City Growth, October 7, 2005;
11. Declaration of Aubrey C. Reeves, Jr., Mayor For the City of Union Gap, February 25, 2005 with attachment;
12. Declaration of Philip A. Lamb, City Attorney, Re Authenticity of Paul Burlingame Declaration, October 7, 2005;
13. Declaration of Paul Burlingame, Former Union Gap City Manager, February 28, 2005 with attachment;
14. Declaration of Terry McGuire, October 12, 2005 and Exhibits A through D;
15. Ecology's Response in Opposition to Appellants' Joint Motion for Summary Judgment;
16. Second Declaration of Stephen H. North, October 26, 2005 and Exhibits 1 through 3;
17. ARBP and Union Gap's Reply to Ecology's Response in Opposition to Appellant's Joint Motion for Summary Judgment; and
18. Third Declaration of Jeff Slothower, November 2, 2005 and Exhibits A and B.

The parties submitted this matter with the written record to the Board for its consideration and also made oral arguments on November 28, 2005. The facts material to the motions are not in substantial dispute. Accordingly, based on the record and argument of counsel and the Board's review of the foregoing documents, the Board enters the following order:

BACKGROUND

[1]

This appeal concerns groundwater certificates issued in 1966 for industrial purposes for operation of a slaughterhouse near Union Gap, Washington. The combined water rights authorized the withdrawal of 2,110 acre-feet per year, 1,520 gallons per minute. These water

1 rights have not been exercised since May 27, 1995.¹ ARBP acquired the industrial purpose
2 water rights when it purchased the slaughterhouse property at the end of October 1999.² Prior to
3 closing, ARBP met with representatives of the City of Union Gap about selling the City the
4 slaughterhouse water rights and converting them to municipal supply purposes.³ Union Gap
5 does not and has never owned the water rights at issue, and ARBP has admitted that it still
6 claims ownership of them.

7 [2]

8 In 1995, Union Gap annexed an area referred to as “South Broadway,” where landowners
9 rely primarily on approximately 100 exempt wells for domestic water. There is known
10 contamination of shallow groundwater in the South Broadway area, which Union Gap regarded
11 as a public health and safety issue.⁴ Since the annexation, Union Gap has been servicing the
12 South Broadway area under temporary water right permits that expired in April of 2002,⁵
13 Regardless of the expiration, on September 30, 2005, Ecology sent the Mayor of Union Gap a
14 letter stating that, if the City requests an extension of the temporary permits: “when we receive
15 this request, [Ecology] will renew the temporary permits, provided the City provides a credible
16 plan that describes how the City will implement the well consolidation process, including a
17
18

19 ¹ Report of Examination, March 17, 2004, North Decl., Ex.1, p.9; Stiner letter, April 7, 1997, Union Gap and ARBP
S.J. Motion, Ex. A

20 ² Statutory Warranty Deed, McGuire Decl., Ex C

21 ³ Rpt. of Examination, North Decl. Ex. 1 p. 9

⁴ ARBP Motion for Summary Judgment

⁵ Ecology April 2, 1999 letter to Union Gap, North Decl. Ex.8

1 proposed schedule.”⁶ Ecology’s temporary permits issued on April 2, 1999 had required Union
2 Gap to either pursue the well consolidation process of RCW 90.44.105 or acquire new water
3 rights to solve its South Broadway water supply issues.⁷

4 [3]

5 From the time Union Gap annexed South Broadway to the present, the City has been
6 considering all possible water supply options.⁸ Some residents of the South Broadway
7 community are moving away from reliance on private wells. The Yakima County Water
8 Conservancy Board recognized Union Gap’s efforts to acquire water and found that, by March of
9 2004, approximately one-third of the potential water service customers in the South Broadway
10 area had connected to the City’s water system.⁹

11 [4]

12 ARBP has been attempting to sell water rights to Union Gap since just before it acquired
13 the industrial rights in 1999. In late summer or fall of 1999, an informal and private meeting
14 took place between Union Gap’s Mayor and its City Manager, and two ARBP members during
15 which they discussed a proposal that Union Gap purchase the industrial purpose water rights
16 ARBP would soon acquire. The meeting occurred in either August, September, or October of
17 1999, but the meeting participants are unsure of the date or time of the meeting. The meeting
18

19 _____
20 ⁶ Ecology September 2005 letter to Mayor Reeves. Ecology Response to ARBP S.J. Motion, Ex.2

21 ⁷ Ecology letter, April 4, 1999, Decl. of Slothower, Ex. D

⁸ Decl. North, Ex. 1, 44, 45 II. 1-9

⁹ Report of Examination, March 17, 2004, North Decl. Ex.1

1 participants shook hands on an agreement for Union Gap to buy the Washington Beef water
2 rights from ARBP, but no record was made of the meeting or its specific outcome.

3 [5]

4 After this meeting occurred, ARBP closed its purchase of the Washington Beef property
5 in October 1999. In November 1999, ARBP hired a consultant to test the wells and pumps at the
6 Washington Beef property.¹⁰ In December 1999, the Union Gap City Council adopted
7 Ordinance 2209, which modified water rate charges. These new rates and connection fees would
8 provide a source of funds to pay for water and sewer system infrastructure and purchase the
9 Washington Beef water rights.¹¹ During 2000, ARBP initiated development of the business
10 park, and submitted two SEPA checklists, neither of which discussed the status of the
11 Washington Beef water rights.¹² May 27, 2000 marked five consecutive years of non-use of the
12 Washington Beef water rights.

13 [6]

14 ARBP had no interest in using the industrial water rights from the Washington Beef
15 property because it did not need them and regarded them only as property that could be sold to
16 help finance the development of a business park.¹³ ARBP permitted Union Gap to help process
17 a water rights transfer application and focused its efforts on establishing a price and payment
18

19
20 ¹⁰ Decl. McGuire, 4-26-04.

¹¹ Dec. Burlingame, 2-28-05.

¹² Dep. McGuire, 10-12-05, Ex. D.

¹³ Dep. McGuire, 9-15-05; 2nd Decl. Tilley, 3-2-05, Decl. North Ex. 9

1 mechanism with the City.¹⁴ On January 5, 2001, Union Gap and ARBP jointly applied to
2 Ecology for transfer of industrial water rights formerly held by Washington Beef, Inc. to be
3 transferred to the City for municipal use.

4 [7]

5 In a January 2001 letter to Ecology, Mayor Reeves said, “It is the City’s request that the
6 existing Washington Beef water rights be transferred to the City’s existing five wells,
7 particularly to the two new “temporary permit” wells as their water right authorizations are
8 scheduled to expire on April 1, 2002.”¹⁵

9 [8]

10 For some time after the informal meeting in the summer or fall of 1999, neither Union
11 Gap nor ARBP took official action to transfer ownership of the ARBP water rights to Union
12 Gap. By the end of 1999, Union Gap’s Mayor states that the City had quit looking elsewhere for
13 water rights.¹⁶ Ultimately, ARBP and Union Gap did execute an Agreement for Purchase of
14 Water Rights in March 2001.¹⁷ March of 2001 was more than five years since the water rights
15 were last beneficially used on May 27, 1995. The Agreement for Purchase of Water Rights was
16 contingent upon Ecology’s approval of the transfer of a specific quantity of groundwater. It
17 could be fully rescinded if Ecology approved an unacceptable quantity of transferred water
18 rights. Also, the Agreement did not set forth any particular price. Rather, a payment mechanism

19 ¹⁴ Dep. Tilley, 9-16-05, Second Decl. Slothower, 10-26-05, Ex. B

20 ¹⁵ Union Gap 1-5-01 letter to Ecology, North Decl. Ex. 33; Decl. Burlingame, p.3. Decl. North Ex. 37; Temporary
Permit, North Decl. Ex. 7

¹⁶ Reeves Dec., 2-25-05.

21 ¹⁷ Agreement for Purchase of Water Rights, ARBP, Union Gap Motion for S.J. Ex.C

1 was outlined involving the payment to ARBP out of funds collected over time from
2 infrastructure charges pursuant to a city ordinance for each property sold in the planned Ahtanum
3 Ridge Business Park to be collected as those lots were sold. Funds were to be transferred to
4 ARBP over time as they were received by Union Gap. The Agreement also contained the City's
5 promise not to impose any other charges for the cost of the existing water lines, latecomer
6 charges, or infrastructure charges other than normal user charges.¹⁸

7 [9]

8 Sale of the water rights was ARBP's only plan. One member of the corporate group
9 recognized that ARBP would not be able to beneficially use or develop any other plan, stating
10 that "from 1999 when the wells were tested, I had no intent to put the water right to any use other
11 than transfer the right to Union Gap and converting the right to municipal uses. In fact, I had no
12 other choice because, if I discontinued the Union Gap transfer, I would not have been able to
13 beneficially use or develop another plan prior to the five-year period of nonuse expiring. ARBP
14 effectively could not do anything else other than transfer the water rights to Union Gap."¹⁹

15 [10]

16 In 2002, Union Gap rescinded the ordinance that authorized the payment mechanism that
17 had been specified in the Agreement for Purchase of Water Rights. ARBP continued to pressure
18 Union Gap to either fulfill its agreement as is or to jointly explore purchase options that were
19

20 ¹⁸ Agreement for Purchase of Water Rights, ARBP, Union Gap Motion for S.J. Ex.C

21 ¹⁹ Second Decl. McGuire, p.3, Decl. North, Ex.10

1 different from the original proposal.²⁰ On November 25, 2003, ARBP wrote to Mayor Reeves,
2 noting that it had sent a letter of revocation of the water rights transfer application to Ecology
3 describing the “original water rights contract” as possibly “breached, nullified, rescinded” and
4 stating that ARBP had understood since 2002 that the arrangement was “not going to work.”²¹
5 Even after the Yakima County Conservancy Board had approved the water rights transfer, ARBP
6 and Union Gap had not resolved their issues regarding payment, and the payment mechanism
7 was the subject of public City Council discussion.²² In November of 2003, ARBP contacted the
8 Yakima County Conservancy Board and asked that the water rights transfer applications be
9 withdrawn.²³

10 [11]

11 Around the same time, the Union Gap City Council discussed the yet-unfulfilled
12 Agreement for Purchase of Water Rights, particularly the fact the ARBP was now demanding
13 \$1.6 million for the water rights, which was a higher price.²⁴ In June 2005, Union Gap and
14 ARBP discussed a new agreement for different consideration, but no new agreement has been
15 executed between Union Gap and ARBP.²⁵

16
17
18
19 ²⁰ Decl. North, Ex. 20

20 ²¹ North Decl. Ex. 27

21 ²² Union Gap City Council Regular Meeting, North Decl. Ex.31

²³ Slothower Decl., 11-17-03, Letter to Conservancy Board, North Decl. Ex. 25

²⁴ City Council Study Session Minutes, North Decl., Ex.18

²⁵ Minutes of Union Gap city Council Regular Meeting, 6-27-05, North Decl. Ex.31

1 [12]

2 ARBP and Union Gap jointly first submitted transfers of the water rights at issue here to
3 Ecology in early 2001.²⁶ Upon Ecology's recommendation, ARBP and the City re-submitted the
4 applications to the Yakima County Water Conservancy Board in March of 2001.²⁷ The
5 Conservancy Board issued decisions approving the transfers in June 2004. Conservancy Boards
6 must submit their decisions to the Department of Ecology for review, which was done in this
7 case. When Ecology indicated that it would reverse these transfer approvals due to a lack of
8 evidence of a fixed and determined plan that had been established prior to the end of the five
9 year period of nonuse, the Conservancy Board withdrew its decisions in September 2004 to
10 allow ARBP and Union Gap to submit additional evidence, which they did. The Conservancy
11 Board again approved the applications on March 17, 2005.²⁸ On April 28, 2005, Ecology issued
12 a decision overturning the Conservancy Board, concluding that "the subject water rights were not
13 used for a period of more than 5 years, and that the Board erroneously interpreted a plan
14 presented in the record as exempting the rights from nonuse pursuant to RCW 90.14.140(2)(c)."

15 [13]

16 As to the assertion of municipal water supply relinquishment exemption, Ecology
17 concluded that "...the Board's finding that the City "claimed" the six subject water rights for
18 "municipal water supply purpose" under RCW 90.14.140(2)(d) is incorrect and that these rights

19
20 ²⁶ North Decl. Ex. 33

21 ²⁷ North Decl. Ex. 34

²⁸ Decl. Haller, 10-12-05; Report of Examination, Slothower Decl. Ex.E

1 are not exempted from relinquishment. Ecology concludes that the City lacked control over, and
2 an equity interest in, the water rights sufficient to assert such a claim.”²⁹ This appeal followed.
3

4 **LEGAL ISSUES**

5 **[14]**

6 Ecology, Union Gap, and ARBP have all moved for summary judgment. Ecology asserts
7 that the water rights that are at issue in this case have been relinquished due to nonuse exceeding
8 five years pursuant to RCW 90.14.130 and that such nonuse is without sufficient cause, as
9 defined in statute. RCW 90.14.140. Union Gap and ARBP assert that sufficient cause for
10 nonuse has been established. They urge the Board to conclude that the water rights are claimed
11 for municipal water supply purposes under Chapter 90.03 RCW (RCW 90.14.140(2)(d) and/or
12 that, pursuant to RCW 90.14.140(2)(c), they were claimed for a determined future development
13 to take place within fifteen years of the most recent beneficial use.

14 **[15]**

15 The parties have combined the issues in this case, each arguing that resolution of the
16 questions as presented by their respective motions for summary judgment will resolve all issues
17 stated in the Pre-Hearing Order. The Board addresses them in a similar fashion. The impairment
18 issue that was set forth as Issue 5 in the Pre-Hearing Order, although discussed briefly by ARBP,
19 does not need to be addressed in light of the Board’s decision below.
20

21 ²⁹ Department of Ecology Water Right Change Application Decision, April 28, 2005, North Decl. Ex. 41

1 [16]

2 To summarize, the issue before the Board in these motions concern whether Ecology's
3 April 28, 2005 reversal of the Yakima County Water Conservancy Board's approval of Water
4 Right Change Application No. CG4-GWC5625-A (YAKI-37-2001), CG4-GWC5767-A(YAKI-
5 38-2001), CG4-GWC5623-A (YAKI-39-2001), CG4-GWC5766-A (YAKI-40-2001), CG4-
6 GWC5624-A (YAKI-41-2001), AND CG4-GWC5621-A (YAKI-42-2001) on the basis that the
7 asserted determined future development exemption from relinquishment applies to ARBP's
8 change application, or whether the municipal water supply exemption from relinquishment
9 applies to this same application. Ecology asks that its decision reversing the Conservancy Board
10 be upheld because the two asserted exceptions to relinquishment (the determined future
11 development exemption, and the municipal water supply exemption) do not apply. Union Gap
12 and ARBP ask that the Board reverse Ecology's decision overturning the Conservancy Board's
13 approval of the changes.

14 ANALYSIS

15 [17]

16 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
17 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
18 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 569 Wn.2d 1152 (1977). The summary
19 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
20 Summary judgment is appropriate when the only controversy involves the meaning of statutes,
21

ORDER GRANTING
SUMMARY JUDGMENT
PCHB NO. 05-078

1 and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*
2 *Security State Bank*, 59 Wn.App. 161, 164, 796 P.2d 443 (1990), review denied, 117 Wn.2d
3 1004 (1991). The party moving for summary judgment must show there are no genuine issues of
4 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
5 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182; 930 P.2d 307 (1997). A material fact in a
6 summary judgment proceeding is one that will affect the outcome under the governing law.
7 *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts
8 and reasonable inferences must be construed in favor of the nonmoving party as they have been
9 in this case. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).

10 **Relinquishment**

11 **[18]**

12 It is the law of this state that water rights are subject to relinquishment if they are not
13 used for five or more consecutive years. Non-use can be excused, and relinquishment thereby
14 avoided, if an exception to relinquishment can be shown. *R.D. Merrill Company v. State of*
15 *Washington Pollution Control Hearings Board*, 137 Wn.2d 118, 140, 969 P.2d 458 (1999).

16 **[19]**

17 Under RCW 90.03.380, valid water rights may be transferred to a different owner, and
18 the purpose and place of use and point of withdrawal or diversion may be changed, provided
19 there is no detriment or injury to existing rights. In order to decide whether to approve a change
20 under RCW 90.03.380, the Department must tentatively determine the existence and extent of

1 the beneficial use of a water right. *Okanogan Wilderness League, Inc.*, 133 Wash.2d at 778-79,
2 947 P.2d 732. Quantification of the right and whether the right has been relinquished or
3 abandoned in whole or in part are matters Ecology must address in deciding whether to approve
4 a transfer or change application. *R.D. Merrill*, 137 Wn.2d at 127. When disputes arise about
5 nonuse, Ecology has the initial burden of proof on the lack of beneficial use of a water right for
6 five consecutive years. Once nonuse is established, the burden shifts to the water rights holder
7 to show that the nonuse falls within a statutory exception. Such exceptions must be narrowly
8 construed: “In addressing the exceptions to relinquishment, it is important to bear in mind that
9 generally exceptions to statutory provisions are narrowly construed in order to give effect to
10 legislative intent underlying the general provisions.” *R.D. Merrill* at 140.

11 **[20]**

12 In this case, there is no dispute that the last date of beneficial use of the Washington Beef
13 water rights was May 27, 1995. Further, there is no dispute that the Washington Beef water
14 rights have not been beneficially used since that time. Thus, the burden is on ARBP and Union
15 Gap to show that either the determined future development or municipal exception applied as of
16 May 27, 2000, the date marking five years of consecutive non-use. The parties have also
17 exhaustively discussed numerous events that occurred after May 27, 2000. These later events
18 speak to the efforts of the parties to implement a water rights transfer and protect contractual
19 rights and interests, rather than speaking to whether a relinquishment exception existed on the
20 date in question.

1 **Determined Future Development**

2 **[21]**

3 RCW 90.14.140(2)(c) provides “there shall be no relinquishment of any water right...if
4 such right is claimed for a determined future development to take place...within fifteen years.”

5 The statute does not fully describe the elements of the exemption, but in *R.D. Merrill*, the
6 Washington State Supreme Court concluded that the exception applied if the following
7 requirements were met:

8 (1) A fixed determination – a firm definitive plan (2) of a future development which will
9 take place within 15 years – encompassing the possibility of future development which
10 may occur after the 5 years non-use period. While the actual development need not occur
within the five years non-use period, there must be fixed development plans within that
period.”

11 In *R.D. Merrill*, the Court also describes the determined future development exception to
12 relinquishment as requiring “conclusively or authoritatively fixed development plans” within
13 five years of the last date of non-use.” *Id.* at 143.

14 **[22]**

15
16 Although it is not required that a development be completed within the statutory fifteen-
17 year period, this Board has held that a development must begin within that period and it must be
18 pursued to completion with reasonable diligence. The Board has held also that, because the
19 exception was obviously intended to allow time for developers to complete complex projects, the
20 determined future development exception does not apply to plans that could be fully
21 implemented in less than five years. It is clear that the Legislature intended the ‘determined

1 future development' exception to protect water right holders from losing their acquired water
2 rights needed for actual development projects but that will take more than five years to bring to
3 fruition.

4 The *R.D. Merrill* court acknowledged the validity of the Board's interpretation, stating,
5 "the agency's interpretation accords with the ordinary dictionary definition of [the term
6 'determined'] and, therefore, correctly states the law." The court went on to hold, "The
7 Board's prior interpretation of the statute as requiring the future development be
8 determined before the expiration of five years of nonuse also comports with the
9 relinquishment statutes." *R.D. Merrill* at 143.

10 *Pacific Land Partners v. Ecology*, PCHB No. 02-037 (2005) (Final on Remand)

11 [23]

12 ARBP and Union Gap argue that their oral agreement made sometime during the
13 summer/fall of 1999 to transfer the water right meets the requirement for a determined future
14 development. Also in 1999, ARBP tested the wells, and Union Gap amended its water and sewer
15 rate ordinance, which would allow for a source of funding for system upgrades and acquiring the
16 Washington Beef water right.

17 [24]

18 Where the application of the determined future development relinquishment exception
19 involves a transfer of a water right between parties, the conduct of both parties may be relevant
20 to determine whether a determined future development exists. In this case, ARBP did not have a
21 determined future development as of May 27, 2000, as its interest in the Washington Beef water
rights transaction was simply to sell the water rights to Union Gap to recover costs associated
with development of the business park. ARBP had no interest in using the water rights, let alone

1 using the water rights for a project that would take longer than five years for full beneficial use
2 of the water right. For example, ARBP member McGuire testified in deposition:

3 I had a plan and the plan was to sell. Buy the water rights and sell them to Union Gap.
4 That was the only plan and the only thing that we were interested in accomplishing as far
as the water rights go.³⁰

5 While an agreement to sell a water right can be part of establishing a determined future
6 development, a plan to sell water rights to someone else to use, absent more, does not constitute
7 a determined future development. Further, ARBP did not even own the Washington Beef water
8 rights at the time of the private meeting in August, September, or October of 1999. ARBP
9 closed on the Washington Beef property on October 29, 1999. Thus, at the time of the
10 handshake agreement, ARBP did not have authority to sell the water rights to Union Gap. And
11 because the City was required to take official action through its City Council in an open public
12 meeting, the Mayor lacked the authority to bind the City to a water rights purchase.

13 [25]

14 In this case, there is no dispute that Union Gap had a need for water and expressed
15 interest in the Washington Beef water rights. By May 27, 2000, however, its interest in the
16 Washington Beef water rights had materialized only as an oral agreement in a private meeting,
17 and a new ordinance to fund water and sewer infrastructure improvements. Between the private
18 meeting to discuss water rights in the summer/fall of 1999 and May 27, 2000, the date marking
19 five consecutive years of non-use, there is not a single document or official action by Union Gap

20
21 ³⁰ McGuire Dep., at 37 ll 21-25.

1 establishing a firm, definitive, or conclusively fixed plan for the acquisition and use of the
2 Washington Beef water rights.

3 [26]

4 This conclusion is consistent with the R.D. Merrill decision, and with recent Board
5 decisions on the determined future development exception. In *Protect Our Water v. Ecology*,
6 PCHB No. 03-102 (2004) (Final Order), the Board applied the determined future development
7 exception to a water right transfer between a nursery and a water district. The Board found that
8 the water district's option agreement to purchase a water right from the nursery did not qualify
9 the water district for the determined future development exception to relinquishment. This was
10 the case even though the water district board had approved the option agreement and entered into
11 a signed agreement. Only when the option agreement was exercised, and a water right purchase
12 and sale agreement was completed, did the determined future development exception to
13 relinquishment apply. In this case, the undocumented oral agreement made at a private meeting
14 in the summer or fall of 1999 between ARBP and Union Gap to transfer the water right is even
15 less firm, definitive, and conclusively fixed than the option agreement found by this Board in
16 *Protect Our Water* to be insufficient to establish a determined future development. The Board
17 notes that Ecology's characterization of the 2001 water rights purchase and sale agreement
18 between ARBP and Union Gap as an "option contract" is incorrect. The agreement includes a
19 contingency based on Ecology approval of a transfer application, and payment based on the

1 quantity transferred, but this is not an option such as the one at issue in the *Preserve Our Water*
2 case.

3 [27]

4 Appellants cite a prior case in which the Board found the Snohomish River Regional
5 Water Authority's proposal and fixed plan to use water that it obtained from the Weyerhaeuser
6 Timber Co. qualified as a determined future development under RCW 90.14.140(2)(c). *The*
7 *Tulalip Tribes of Washington v. Ecology and Snohomish River Regional Water Authority*, PCHB
8 No. 01-106, Finding of Fact VII. However, in that case, the water authority had already
9 obtained a legal interest in the former Weyerhaeuser water right, and submitted a water right
10 change application to Ecology, prior to the expiration of the five-year nonuse period. In this
11 case, Ecology argues that there was no enforceable contract made between ARBP and Union
12 Gap during the nonuse period and that Union Gap never owned the water rights or had any
13 lawful control over them during that period of time or since. The Board agrees that Union Gap's
14 lack of a legal interest in the Washington Beef water rights prior to five years of consecutive
15 non-use is critical. The difference between the facts of this case and those in the *Snohomish*
16 *RWA* and *Protect Our Water* cases (in which both Ecology and the Board concluded that the
17 determined future development exception to relinquishment applied) was that Union Gap, prior
18 to five years of consecutive non-use of the Washington Beef water rights, never obtained a legal
19 interest in the water rights or established a firm, definitive, and conclusively fixed plan for the
20 use of the water rights.

1 [28]

2 An informal, private meeting followed by a handshake cannot lawfully bind a city, which
3 must act in accordance with the laws that govern the exercise of its authority including the Open
4 Public Meetings Act³¹ and laws regarding acquisition of real property. Eventually, the Union
5 Gap City Council approved the acquisition of the Washington Beef water rights, and the parties
6 executed the Agreement to Purchase Water Rights on March 26, 2001. But by that time, the
7 water rights had not been used for more than five consecutive years. The Board concludes that
8 Union Gap and ARBP do not meet the requirements for the determined future development
9 relinquishment exception.

10 **Municipal Water Supply Purposes**

11 [29]

12 A Washington water right claimed for municipal water supply purposes under Chapter
13 90.03 RCW is exempt from statutory relinquishment. RCW 90.14.140(2)(d). “Municipal water
14 supplier” means an entity that supplies water for municipal water supply purposes. RCW
15 90.03.015(3). “Municipal water supply purposes” is defined at RCW 90.03.015(4) as a
16 beneficial use of water

17 (a) For residential purposes through fifteen or more residential service connections or for
18 providing residential use of water for a nonresidential population that is, on average, at
least twenty-five people for at least sixty days a year;

19 (b) for governmental or governmental proprietary purposes by a city, town, public utility
20 district, county, sewer district, or water district; or

21 ³¹ Chapter 42.30 RCW.

1 (c) indirectly for the purposes in (a) or (b) of this subsection through the delivery of
2 treated or raw water to a public water system for such use. . .

3 As of May 27, 2000, the Washington Beef water rights were owned by ARBP, and had
4 an industrial purpose of use. At that time, the Washington Beef water rights were neither being
5 used for residential purposes under RCW 90.03.015(4)(a), nor were they used by governmental
6 or governmental proprietary purposes under subsection (b).

7 **[30]**

8 ARBP attempts to meet the municipal supply purpose relinquishment exception by
9 arguing that Union Gap controlled the water rights transfer process. But as of May 27, 2000,
10 Union Gap did not have a legal interest in the water rights. Any control that Union Gap had in
11 the transfer process itself was permissive. Union Gap's applications to Ecology and to the
12 Yakima County Conservancy Board were made at the direction and by permission of ARBP,
13 which granted specific permission to Union Gap to help process a transfer, and applied for the
14 changes jointly with the City.³² Further, the water right change applications were not submitted
15 to Ecology until January 2001, after the five year period of non-use had expired.

16 **[31]**

17 The outcome in this case speaks to the complexity of the water code, the risks of water
18 right transactions, and the need for diligence. Given Union Gap's need for water for its citizens,
19 ARBP's willingness to sell the Washington Beef water rights, and the difficulty of obtaining
20

21 ³² Dep. Tilley, 9-16-05, Second Decl. Slothower, 10-26-05, Ex. B

1 water rights in the Yakima Basin, the outcome of this case is indeed regrettable. It is said that
2 “the law abhors a forfeiture.”³³ While that is true, in this case, the law is forfeiture.

3
4 **ORDER**

5 In accordance with the analysis above, Respondent Department of Ecology’s Motion for
6 Summary Judgment is GRANTED, Ecology’s decision reversing the Yakima County
7 Conservancy Board’s approval of the water rights at issue in this case is AFFIRMED, and this
8 appeal is DISMISSED.

9 SO ORDERED this 5th day of January 2006.

10 **POLLUTION CONTROL HEARINGS BOARD**

11 WILLIAM H. LYNCH, CHAIR

12 BILL CLARKE, MEMBER

13 CASSANDRA NOBLE
14 Administrative Appeals Judge, Presiding

15
16
17
18
19
20
21

³³ State v. Martin, 137 Wn.2d 149, 160 (1999)